

McDonnell Douglas Corporation and Robert H. Mourning, Case 31-CA-1435

7 September 1984

**ORDER DENYING MOTION AND
CLARIFYING SUPPLEMENTAL
DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 15 June 1984 a three-member panel of the National Labor Relations Board issued its Supplemental Decision and Order¹ in the above-entitled proceeding, in which it awarded backpay to the Charging Party in the sum of \$13,310.19, plus interest less applicable deductions, for the backpay period 15 November 1968 through 9 June 1970. Thereafter, on 6 July 1984, the Respondent filed a "Motion for Reconsideration and Modification of Supplemental Decision and Order," requesting that the backpay award and footnote 3 of the Board's Supplemental Decision and Order be corrected. On 13 July 1984 the Charging Party filed an opposition to the Respondent's motion.²

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Respondent's motion and the Charging Party's opposition and has decided to amend its Supplemental Decision and Order only to the extent indicated below.

The Respondent, in its motion, for the first time, claims that the backpay award is incorrect because it includes an amount for the period of 9 June—30 June 1970, a period *outside* the backpay period found by the Board. The Respondent represents that the General Counsel does not oppose correcting the backpay figure. In support of its representations regarding the General Counsel's position, the Respondent forwarded computations reducing the backpay amount to \$12,290.16, exclusive of interest. The Charging Party objects to any correction of the backpay award because the Respondent is attempting to raise an untimely exception to the underlying administrative law judge's decision. We agree with the Charging Party's contention.

Section 102.46 of the Board's Rules and Regulations sets forth certain specificity and time requirements for the filing of exceptions to the administrative law judge's decision or to any other part of the record or proceedings. Section 102.46(b) of the Board's Rules provide:

(b) Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the administrative law judge's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied on; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. *Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.* [Emphasis added.]

Section 102.46(h) of the Board's Rules states: "No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding."

We note that ample time was given all parties to review the judge's decision and file any exceptions or cross-exceptions pertaining thereto. We also observe that the Respondent had adequate opportunity to raise and specify this alleged backpay computational error when it filed with the Board its other exceptions to the backpay figure and addressed the other parties' exceptions. The Respondent presented many alternative arguments regarding backpay computations, none of which included this alleged computational error, even though the Respondent pointed out other alleged errors with the backpay specification computations. In these circumstances, we will not permit the Respondent to submit this untimely exception to the backpay amount because it failed to specifically raise this backpay issue at the appropriate time.³ Accordingly, we shall deny that portion of the Respondent's motion requesting the acceptance of the late-filing of its exception to the backpay amount.

The other portion of the Respondent's motion pertains to footnote 3 of the Board's Supplemental Decision and Order. The Respondent claims that the eighth sentence of footnote 3 is in error to the extent it indicates that the judge engaged in an analysis of Charging Party Mourning's interim employment efforts after the third quarter of 1971 because the judge did not, in fact, discuss this issue. The sentence was meant to convey that the judge, in reviewing pre-9 June 1970 events, discredited Mourning on a few matters, but that such discrediting did not warrant the denial of backpay to Mourning. Then, we reviewed and found Mourn-

¹ 270 NLRB 1204.

² The General Counsel filed no response to the Respondent's motion.

³ See *Stage Employees IATSE Local 249 (General Cinema Corp.)*, 265 NLRB 637 (1982); *Triangle Sheet Metal Works*, 267 NLRB 650 fn. 3 (1983).

ing's interim employment efforts post-third quarter 1971 did not warrant a denial of backpay for the period specified by the judge.⁴ We also point out that any ambiguity raised by this particular sentence of footnote 3 appears to be now moot in view of the Respondent's representation that it no longer contests backpay for a period ending 9 June 1970. However, because we wish to avoid any further confusion,⁵ we now clarify footnote 3 to the extent set out below.

ORDER

It is ordered that the Supplemental Decision and Order in the above matter be amended to delete the sentence in footnote 3, "The few instances

⁴ One of the Respondent's defenses included an argument that backpay for pre-9 June 1970 was negated by the Charging Party's efforts to seek interim employment post-third quarter 1971.

⁵ We have been notified that the Charging Party has sought court review of the Board's backpay determination.

where the judge has not fully credited Mourning and Mourning's efforts in seeking interim employment after the third quarter of 1971 is not the sort of employee behavior where backpay has been denied in the past by the Board" and substitute in its place the following: "Upon our consideration of the record, Mourning's efforts in seeking interim employment after the third quarter of 1971 do not constitute the sort of employee behavior upon which the Board has denied backpay in the past. Furthermore, we find at the few instances where the judge discredited Mourning concerning pre-9 June 1970 events do not warrant denial of backpay."

IT IS FURTHER ORDERED that the Respondent's motion for reconsideration of the Supplemental Decision and Order is denied in all other respects.